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ABSTRACT

Addressing the issues of the application of the First Amendment and deregulation, this paper examines the judicial and legislative precedents for cable television regulation and the current industry status. The paper then addresses the questions: (1) Should and could a different regulatory approach be taken? (2) What types of models might best be followed? and (3) How would a different approach withstand the First Amendment scrutiny that led the cable industry to where it is today? The paper specifically examines the common carrier/public utility and state/municipal ownership models of regulation. The paper concludes that the application of the First Amendment and deregulation have gone too far and will not produce a system that goes to the heart of preserving minority views and generally serving the public's best interest. (Seventy-three notes are included.) (RS)

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CABLE, THE FIRST AMENDMENT, AND THE FUTURE:

A TIME TO CHANGE COURSE

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CABLE, THE FUTURE, AND THE FIRST AMENDMENT: A TIME TO CHANGE COURSE

I. INTRODUCTION

Is it time to continue to move toward a print model and free marketplace approach to the regulation of cable in light of cable's growing monopoly power in the television industry? Moreover, is the intent of the First Amendment and the public's interest being best served as the telephone companies enter the picture and the integration of technology and services into a digital network becomes reality?

Since the late 1970's, the courts have increasingly recognized cable as having First Amendment rights and editorial freedom as similar to other fully protected media such as newspapers. Even the Federal Communications Commission has relaxed its "burdens" formerly placed on the industry and, in keeping with its deregulatory pace, is now advocating a free marketplace approach. The result for cable is less structural and behavioral regulation and a lucrative future, bright with free rein in a deregulated market.

The picture has been changing, however. Economic efficiencies have been transforming the once, small-time industry into a growing, monolithic giant, with nationwide mergers and horizontal and vertical integrations, not to mention local

monopoly power. The industry is beginning to leave traces of monopolistic abuses, foreshadowing a future that free speech and deregulatory advocates may not have foreseen and/or certainly not have desired.

Technological change is also tugging at the shape of things to come. The advent of fiber optics and the integration of services into a single, digital network is turning the telephone industry on to cable. The telcos logically stress the efficiency and progressiveness of an integrated services digital network (ISDN) and seek entry into the cable television market. Their First Amendment claims to do so are likely to be answered, essentially handing the lucrative cable venture over to an even more powerful gatekeeper.

To this point, the application of the First Amendment and deregulation have gone too far and will not produce a system that goes to the heart of preserving minority views and generally serving the public's best interest. Regulators need to look ahead and react quickly in guiding a growing and merging industry into one which meets the individual, social, and economic demands of free speech, social welfare, and efficiency and innovativeness.

This paper discusses this issue by first examining the judicial and legislative precedents to cable regulation and the current industry status. It then addresses the questions: 1) Should and could a different regulatory approach be taken? 2) What types of models might best be followed? and 3) How would a

different approach withstand the First Amendment scrutiny that led the cable industry to where it is today? The paper specifically examines the common carrier/public utility and state/municipal ownership models of regulation.

II. REGULATORY PRECEDENTS -- THE TREND TOWARD A PRINT MODEL AND FULL FIRST AMENDMENT RIGHTS

Over the years, the courts, and in turn the FCC, have been moving away from any common carrier and even broadcast model view of cable television in favor of granting cable greater First Amendment and marketplace freedoms. The courts have gradually come to view the circulation, editorial, and program origination function performed by cable systems as significant and not different in kind from the First Amendment functions performed by such fully protected media as newspapers. The FCC, reacting to the courts and its own deregulatory persuasions, has also supported the relaxation of its rules and regulations, and even advocates a free marketplace approach to cable regulation.

Judicial precedents which have served to create today's cable regulatory environment go back as far as 1968, to United States v. Southwestern Cable Company.[1] The Court, in that case, upheld FCC jurisdiction of cable television as "reasonably ancillary to the effective regulation of broadcasting,"[2] and commented that the FCC had no discretion under the Communications Act of 1934 to regulate traditional cable systems as common

carriers.[3] Of course, the industry still bore a plague of common carrier-like constraints and regulations it considered to be more than "reasonably ancillary." But within a few years after the FCC created its "onerous" 1972 rules, the courts began to chip away at the restrictions which effectively limited a cable system as a quasi-common carrier and broadcaster.[4]

The D.C. Circuit Court of Appeals first intimated that cable is analogous to print in its 1977 HBO decision.[5] The court gave consideration to First Amendment issues in invalidating the FCC rules restricting cable's access to pay programming. It found that "an essential precondition" of the Red Lion approach -- "physical interference and scarcity requiring an umpiring role for government" -- is inapplicable to cable, with its abundance of channels and wire method.[6] Even though cable may be "a natural economic monopoly," the court stated that "scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press . . . , and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point."[7]

In 1979, the Supreme Court struck down the federal access channel regulations as an infringement of the editorial freedom of cable, holding that cable is not a common carrier. In Federal Communications Commission v. Midwest Video Corporation,[8] the FCC argued that the access rules were designed to promote greater

programming diversity and increased outlets for local self-expression. Nonetheless, the Court determined that the rules were beyond the Commission's "reasonably ancillary" jurisdiction, violating the distinction between broadcasting and common carrier regulation as found in the Communications Act of 1934.[9] Although the Court declined to decide the First Amendment questions raised, it did state that cable operators "share with broadcasters a significant amount of editorial discretion regarding what their programming will include."[10] It further suggested that the rules "might violate the First Amendment rights of cable operators" and that the issue is "not frivolous."[11]

The lower courts then led the way in drawing even stronger parallels between cable and print rights. Content controls aimed at restricting "obscene and indecent" programming on cable were rejected using the standards for print rather than broadcast.[12] Even some parts of the Cable Communications Policy Act of 1984, not to mention the FCC's Must Carry rules and revised rules, have failed First Amendment scrutiny by lower courts.[13]

The biggest prize came in 1986, however, when the Supreme Court agreed to hear the Preferred case, and for the first time, came out stating that cable activities implicate "First Amendment interests," as similar to the print media.[14] The case concerned whether or not a city could limit access to a cable operator when public utility poles could accommodate more than one set of cables. The High Court decided the case on a narrow ground and

remanded it for further factual dispute, but not without expressing its views. Justice Rehnquist, in delivering the opinion, stated that "(c)able television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspapers and book publishers, public speakers and pamphleteers."[15] The print analogy cleared the path for further expansion of speech rights for cable and set the framework for future regulation.[16]

The FCC has, of course, not been without input in establishing the revised line on cable. The FCC, for example, toyed with the concept of common carrier regulation of cable, but repeatedly rejected the idea.[17] The many cable rules it did create have been struck down over the years, and despite the cries of broadcasters, the motion picture industry, and recently Congress, it eventually assumed a role of less government oversight.[18] This trend is largely tied to the FCC's general trend toward deregulation. The Administration's philosophy as of 1980 and the subsequent FCC Chairmen's approach to cable has especially been geared to the loosening of the reins and simplifying the regulatory process, allowing market forces to predominate. The deregulatory approach to cable has been in response to sympathy for an underdog that had not put broadcasters in the poorhouse, but rather was seen to offer diversity within the goals of a rapid, fair, and efficient telecommunications system.[19] Congress' 1984 Cable Act further set much of the deregulatory moves into stone, granting cable

systems greater leverage and freedom from local controls and rate regulation.

Hence, the deregulatory changes and the First Amendment freedoms extended to cable have delivered the fledgling industry into a new era -- one of editorial and market freedoms not unlike the print media. Many, including scholars, have long advocated that cable deserved such full rights and market freedom.[20] Only broadcasters, the motion picture industry, and certain public interest groups continued to advocate restrictions placed on the industry. Their justifications generally fell on deaf ears, and unfortunately so did their warnings.

III. MONOPOLY, INTEGRATION, AND THE FUTURE -- A TIME TO CHANGE COURSE

The one-time "suppressed" industry has now come full circle, to not only savor its new freedoms but to engulf them, growing like a giant prepared to devour and control the land. Economic efficiencies, coupled with technological advances, have allowed cable to successfully capitalize on the "print model," and have ensured the industry success as the country enters into ISDN. The telcos' entry into the industry will only strengthen monopolistic controls and hence controls over the very First Amendment values which led the industry to where it is today.

What followed the Cable Act of 1984 was a period of rapid horizontal and vertical integration led by Tele-Communications,

Inc., the largest cable operator in the nation.[21] Even prior to the Act, the cable industry had realized the logic of economic profit maximization and began its vertical extension into the syndication and production of programs, thereby appropriating the profits of program production and syndication in addition to those of its mere transmission.[22] For example, American Television and Communications Corporation (ATC) was already associated with the nation's largest program supplier, HBO, and the program service Cinemax, as well as the USA Network.[23] Since the '84 Act, TCI and other multiple system operators have banded together in acquiring numerous interests in systems such as Group W and Storer, and programming services such as the Discovery Channel.[24]

Cable systems are also enjoying the luxury of an economic, local monopoly. Even the Supreme Court has recognized cable systems as a "natural monopoly."[25] Few communities have overbuilds or municipal-owned systems.[26] And despite the questions raised by the Preferred case, few communities can expect to be served by more than one system because of the high capital costs and economies of scale.[27] Competition from similar forms of expression -- DBS, STV, and MMDS -- has not materialized as was expected by this time.

The impact of these economically inevitable consequences has fast become apparent. With the unregulated structure in place, the country is now seeing abuses characteristic of a monopoly. The uncapping of prices has recently resulted in an increase in

subscriber rates and a financial boon to cable systems. Some systems are repositioning or dropping carriage of local over-the-air stations -- which happen to compete for local advertising dollars. Even claims of extortion by cable operators are reaching the FCC and Congress. The industry has also been accused of exerting pressures on the home satellite dish (TVRO) market.[28] Cable now effectively has controls over the production, distribution, and exhibition of television programming, not only through its own immediate industry, but through the video cassette and home satellite dish industries and indirectly the over-the-air industry. The local monopoly is tied to a mere oligopoly on a national level. As a result, Congress has been inundated with complaints and calls for new regulation and regulation of the medium.[29]

The consequences of such control over what has become the "primary medium of entertainment and information" are especially serious in a society where the unimpeded flow of diverse information is a fundamental requirement.[30] The goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources"[31] is not met by an unregulated monopolist or oligopolist and is certainly not reduced by promises of self-restraint.[32] The editorial functions granted to an industry which serves as the gatekeeper to the bulk of the most "pervasive" of media do not serve the objectives intended by the First Amendment.[33] Certainly a cable operator that is vertically integrated into program production would favor its own

affiliated services over those of its competitors.[34] Similarly, its views would take precedence. Moreover, the economic logic of monopoly operation also causes the number of channels that are offered to be smaller than optimal, thus threatening the diversity of programs and sources that can reach the public.[35] The analogy to print media is deceptive -- a cable operator cannot claim that his simultaneous transmission of independent networks comprises a single message. Unlike a single publisher, the cable operator is able to control and stifle the voices of a large number and percentage of the media market and determine what messages entire communities may receive. Such business judgments are not of a First Amendment character -- they are mere economic "rights."[36]

Unfortunately, ISDN and the potential entry of telephone companies into the market only aggravates the situation. The telephone industry is agitating to remove regulatory barriers so it can offer video services along with telephone services and, effectively, enter into the cable television industry. The telcos are currently restricted under the AT&T divestiture's Modified Final Judgment,[37] the FCC's 1970 Cross Ownership rules,[38] and the 1984 Cable Act.[39] Nonetheless, the NTIA and the FCC have suggested that Congress (and Judge Harold Greene) reconsider the prohibitions, and telco entry is considered by many to be inevitable.[40]

The problem with telco entry is that more voices will not be introduced, creating an uninhibited marketplace of ideas. Many

regulatory advocates are supporting the admission of the telephone industry as a compromise to introduce competition while preserving a marketplace ideal.[41] But phone company "competition" is not a solution to the problem of cable's unregulated monopoly. In the first place, the local telephone industry is an even greater monopoly with deeper pockets and cross-subsidization potential that would allow it to engage in predatory pricing and an eventual buyout of the less wealthy cable enterprise. The Baby Bells, for example, had revenues in 1987 of between $8 billion and $12.3 billion while TCI had, albeit substantial, a revenue of $1.7 billion.[42] Others argue that neither industry has the expertise to adequately provide the other's services in the short term, and that the telephone and cable industries would instead jointly cooperate in the provision of ISDN services.[43] In either case, an even bigger giant will control the information flow to the masses. The telcos claim it is their First Amendment right to be allowed into such information services.

This situation and the advent of ISDN poses a number of different conflicts, such as one between the forces of free speech and any right to receive information as through economic efficiencies.[44] A single wire offering all services and hence information on a universal basis has certain collectivist appeal as compared to a less efficient but "diverse" arrangement which would only "cream-skim" a certain audience. Essentially the benefits of ISDN may not be fully realized unless a single

operator makes the provisions. This conflict then lends itself to yet another conflict between content and conduit. Why must the two be inseparable?

The FCC, courts, and Congress have already been struggling with the circumstances of this question as it pertains to cable and "noncable" services and have left no clear answers. There are confusions over the distinction between each type of "content," the regulatory model applicable, and the regulatory jurisdiction. For example, in 1983 the Nebraska Public Service Commission (NPSC) ordered Commline, an institutional cable network of Cox Cable Communications, Inc., to cease and desist operations, only to have the FCC pre-empt jurisdiction, citing the interstate (and progressive) nature of the operation.[45] The authors of the Cable Act, however, did not attempt to resolve the regulatory issues presented. Section 621(c) prohibits the regulation of a cable system as a common carrier or public utility; however, the Act does allow a State PUC to regulate "noncable" services as a common carrier, and provides a general definition.[46] Unfortunately the real distinctions will only be made in future regulatory battles which are sure to come.

The monopoly power, integration, and this regulatory confusion surrounding the growing cable information industry calls for regulatory reconsiderations. The time has come as the cable industry is testing the limits of its monopolistic powers. Specifically, the motion picture industry wants restrictions on vertical integration, broadcasters want Must Carry, and the

cities want to reopen the Cable Act to recapture some of the regulatory power lost because of the Act's interpretation by the FCC and the courts. But at the heart of the matter lies the First Amendment, which no matter what, must be preserved. Any new model of regulation must meet its test.

IV. STRUCTURAL REREGULATION -- MEETING THE FIRST AMENDMENT TEST

Clearly the industry is in need for some form of regulatory reconsiderations to address the problems raised from deregulation. The print model approach to cable regulation is proving sorely destructive to the First Amendment claims which delivered cable to its current monopolistic power. Logically, other models for cable regulatory structure should be considered. Since the integration of cable and noncable services and the notion of conduit and content must be addressed, the common carrier/public utility model and state/municipal ownership model will be examined.

A. Common Carrier/Public Utility Model

Perhaps the most clear-cut way to respond to the local monopoly in cable would be to separate a cable company's distribution role from its programming function. Under such a separations policy structure, cable system operators would act

solely as conduits for the programs of others without control over the nature or content of programs.[47] A system would simply offer "access" to all "speakers" on a non-discriminatory basis at a "reasonable" fee. In this way, the function of cable operators would conveniently come in line with that of telephone systems which are, for the most part, regulated as common carriers.[48] Some states such as Connecticut and Rhode Island have, in the past, regulated cable as a public utility. Currently, West Virginia and New Hampshire are considering public utility regulation despite the Cable Act's prohibition. The Kentucky legislature is mulling a resolution to amend the Act.[49]

This model for regulation is thus not new, but is in fact a relevant regulatory scheme for application at this time. In the early 1970's, the FCC recognized the merits of common carrier status for cable but rejected the model in 1972, finding the action premature.[50] Similarly, the 1971 Sloan Commission, the 1974 Presidential Cabinet Committee, and the 1976 House Subcommittee cable reports all recommended a strict separation of programmer and cable operator as soon as it was economically practical.[51] The 1974 report specifically recommended that cable operators be forced to give up control of the content of all but two or three channels as soon as the industry served 50% of cable homes -- a milestone reached in 1987.[52]

Of course, some attempts at common carrier types of regulation have been struck down by the courts and have been seen as violative of the First Amendment, but a common carrier and

public utility model may pass muster today. For one thing, the proposition in Midwest Video II that providers of noncable communications services cannot be lawfully regulated as common carriers is misplaced.[53] The FCC imposed a common carrier requirement on cable companies as a prerequisite to engaging in broadcast-related businesses, and so the Court easily found the requirement had imposed common carrier status on a broadcaster. Therefore, the rule is that a broadcast system is not obligated to provide its services on a first-come, nondiscriminatory basis; but, it does not disallow common carrier regulation of a nonbroadcaster -- particularly one engaged in "noncable" services. Furthermore, the regulatory model is particularly relevant as cable will, in conjunction with the telcos, function more like traditional common carriers.[54] In NARUC II, the Court of Appeals held that the intrastate noncable communications services are subject to the jurisdiction of the same state PUC's that regulate local telephone companies.[55] Moreover, the 1984 Cable Act does allow for the common carrier regulation of such services.

The common carrier/utility model would well serve the collectivist interests and a system bent on serving the public's best interests. It effectively serves the needs of a society for an open flow of dialogue,[56] and, as a form of structural rather than behavioral regulation, it removes the government from (any direct) intervention into content transmitted. State PUC's particularly defend the state regulation of cable systems as a

measure necessary to ensure that the growth of the new services does not undermine realization of the traditional government goal of facilitating universal service[57] -- one goal similar in scope to that of the First Amendment.[58] Moreover, the model serves to promote diversity in service supply because vigorous competition for channels would result when there is no monopolist gatekeeper. From a regulatory standpoint, the model is obvious, practicable, and essential, and would also: facilitate easier market entry by prospective private sector service providers; enable the best use of different types of transmission systems; allow simpler regulatory and administrative arrangements, and; lower subscription prices (due to greater programming competition).[59]

The model does not go without problems. Programming power is a consequence of monopoly which a common carrier status does not diminish unless the industry is vertically disintegrated. Fewer channels, and hence less diversity, may result when the cable operator leases few channels in order to profit-maximize. The separation of cable provider and operator would also sacrifice certain economies, raising the industry's costs significantly and inhibiting cable expansions.[60] Moreover, the jurisdictional matters, as noted earlier with the Cox case, must be settled, and the separations would simply be difficult to apply to an industry already in place.

The primary problem in implementing such a regulatory transition, however, is a matter of the First Amendment. Taking away the existing speech rights of cable operators could only be

accomplished if there existed a compelling State interest. An antitrust suit would be questionable. Certainly the scarcity rationale of Red Lion would not suffice, and if cable is considered to be most like print, then the economic monopoly argument of Tornillo would be rejected.[61] In short, the model serves the collective, but not the individual rights of the cable operator.[62]

A pure public utility model as opposed to a common carrier model, although essentially similar, may help mitigate the problem. In practice, under a public utility model, cable operators could enjoy greater First Amendment latitude than under the common carrier model.[63] In 1980 in Consolidated Edison Co. of New York v. Public Service Commission of New York, the Supreme Court said, for the first time, that public utilities have some degree of First Amendment protection for the expression of their controversial views. The Court stated that a privately owned but government regulated monopoly is not precluded from First Amendment rights. "The speech of a heavily regulated business may enjoy constitutional protection."[64] Thus, it may be seen that a regulated cable utility could be afforded its own channel capacity and effectively not be denied its individual speech rights.

For the public utility model to work, cable would need to be legally defined as a public utility, and Congress would need to eliminate the Cable Act provision which prohibits public utility regulation of cable services. Public utility cases over the

years have come to define a utility as a business "affected with the public interest," having the potential for price discrimination and the power to extort, while operating as a "necessary" supplier/distributor. Although these elements have been tested successfully and unsuccessfully over the years,[65] the key dispute is cable's "necessity" as a public service. With ISDN and the demands of the information age, the arguments are now more convincing.

B. State/Municipal Ownership Model

A second way to deal with the cable monopoly is to substitute public for private ownership. Under such policy, the physical cable system would be typically owned by the local or state authority. The necessary capital can be raised by revenue bonds backed by the credit of the local government. Actual technical operation may even be subcontracted to private operators, including cable companies -- which may even ease in the transition of such a model.

Public ownership of cable systems is not new, but has been seldom practiced. Still, ownership by local governments (or by nonprofit or subscriber groups) has increased in recent years; in fact, Iowa has moved to establish a state agency to fund municipally-owned overbuilds.[66] Whether a community may own a system is a matter of state law.

Although there were efforts to prohibit municipal ownership, the 1984 Cable Act expressly permits a state, political subdivision, agency, or franchising authority to own a cable system. Where there is such ownership, the Act imposes one qualification:[67] A governmental body may not directly or indirectly "exercise any editorial control regarding the content of any cable service" on the system, except on a government or educational channel, unless such control is exercised by a separate entity. This qualification forbidding editorial control addresses the long-standing First Amendment concerns of municipal ownership. By giving the government control over a powerful and dominant medium, municipal ownership presents obvious, potential conflicts with the First Amendment. If local governments used their positions to censor speakers through selective monitoring of program content, they would threaten the First Amendment's free speech guarantee.[68] Nonetheless, in City of Issaquah v. Teleprompter Corp., the Supreme Court of Washington held that government ownership was within the city's powers under state law and, did not, in the absence of any actual suppression of viewpoints, abridge freedom of speech.[69]

The pros and cons of public ownership are several. The main argument in favor of a publicly owned system is that it could assure a diversity of access. Ownership would also serve as a potential revenue source. On the other hand, government is known for its traditional inefficiency in operating a business operation.[70] The potential politicization of programming and

access allocation could even create First Amendment problems.[71]

Moving from a privately owned system to a publicly owned system would need to be done carefully, so as not to disrupt any First Amendment rights of private cable operators. Under the Preferred decision, it may be clear that cities have no authority to prevent the building of private systems (although the facts of the case are still being decided). Yet in the more recent TCI v. Jefferson City case, it is clear that cable systems do not have a First Amendment right to retain a franchise in the face of a community's preference for a competitor's service. The judgments have come a long way since Community Communications Co. v. City of Boulder.[72] If anything, communities themselves can respond to the abusive power of the cable monopoly by building their own systems.

V. CONCLUSION

The time has come to change course in the regulatory approach to cable. Since the application of the print model and, hence, full First Amendment rights, the cable industry has been seen to grow into a monopolistic giant, unleashed in a deregulatory environment, and undeserving of the very freedoms which delivered it to this point. ISDN and interest from the telephone industry will only feed the already dominant power.

Some other model -- be it an existing or new model -- needs to be considered as many are calling for the reregulation of the

industry. Even the High Court in Preferred concurred that in "assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."[73] The models examined here are the common carrier/public utility and public ownership models. The analysis is certainly not exhaustive, and may even be expanded to behavioral types of regulation. Regardless, the mode of regulation must meet the tests of the First Amendment and best advance its goals in both an individual and collectivist realm.

If the regulatory decision is to continue to allow market forces to dominate, it is possible that the cable industry would grow to become the next private, national monopoly -- following precisely in the early footsteps of AT&T. It is also possible that due to the expected relationship between the telco and cable industries, the cable industry will fade from being the provider of physical plant and establish itself as only the provider of information and entertainment content. The decision would be highly lucrative and not unrealistic. Nonetheless, the behavior of the industr(ies) as they change, will be a product of the reregulatory decisions of today.

NOTES

[1]392 U.S. 157 (1968).

[2]Id. at 178.

[3]Id. at 169 n.29.

[4]The Supreme Court did, however, uphold some of the rules at first such as requiring local origination. United States v. Midwest Video Corp., 406 U.S. 649 (1972).

[5]Home Box Office, Inc. v. FCC, 567 F. 2d 9 (D.C. Cir. 1977), per curiam, cert. denied, 434 U.S. 829 (1977).

[6]Id. at 45.

[7]Id. at 46. Also see Geller and Lampert, Cable Content Regulation and the First Amendment, 32 CATHOLIC UNIVERSITY LAW REVIEW, 603, 610 (1983).

[8]440 U.S. 689 (1979).

[9]47 U.S.C. Sec. 153(h) (1982). This states that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier."

[10]440 U.S. 689 at 707.

[11]Id. at 709 n.19.

[12]Cases such as Home Box Office v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

[13]47 U.S.C. Sec. 543 (Supp. 1985), and Quincy Cable v. FCC 12 MLR 1001 (D.C. Cir. 1985).

[14]City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034 (1986).

[15]Id. at 2037.

[16]This does not overlook the subsequent Supreme Court decision of TCI v. Jefferson City, Mo. in which the Court upheld a decision that cable operators do not have a First Amendment right to retain a franchise.

[17]The first time was in 1958 -- Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958). The Commission again refused to regulated cable as a common carrier in 1966.

[18]This is not to say that the FCC abandoned all efforts -- it did attempt to continue the Must Carry rules, and even recently reinstated the Syndicated Program Exclusivity rules (Syndex) (May 23, 1988).

[19]After numerous studies, the FCC found that the impact on broadcasting stations from deregulation of cable would be negligible, and that consumers would be better off due to increased viewing options. This led to the repeal of the Distant Signal and Syndicated Program Exclusivity rules. See Malrite TV, Inc. v FCC, 652 F. 2d 1140 (2d Cir. 1981), cert. denied.

[20]See, for example, Goldberg, Ross, and Spector, Cable Television, Government Regulation, and the First Amendment, 3 COMM/ENT LAW JOURNAL 577 (1981).

[21]Cable: The First Forty Years, BROADCASTING, Nov. 21, 1988, at 46. TCI has 8.4 million subscribers. TCI's Draper Argues Against Telcos Offering Cable Service, BROADCASTING, April 25,

1988, at 60.

[22]Noam, Towards An Integrated Communications Market: Overcoming the Local Monopoly of Cable Television, 34 FEDERAL COMMUNICATIONS LAW JOURNAL 209, 212 (Spring 1982).

[23]Id.

[24]Mileposts on the Road to 40, BROADCASTING, Nov. 21, 1988, at 49.

[25]TCI v. Jefferson City, Mo.

[26]For example, there were only 33 municipally owned systems in 1983. BRENNER & PRICE, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO, 4-17 (1986). There are also only approximately the same number of overbuilds.

[27]See Kahn, Debate Over First Amendment Fallout Stirring Among Insiders, CABLEVISION, July 1, 1985, at 11. Also, Does More Cable Mean More Voices? ADVERTISING AGE, Dec. 2, 1985, at 16.

[28]Cable Holds Its Own in the House, BROADCASTING, May 16, 1988, at 31.

[29]Id.

[30]Noam, at 214.

[31]Quoting Associated Press v. United States, 326 U.S. 1, 20 (1945).

[32]Cable operators are trying to convince Congress that they will compromise and cooperate on many fronts.

[33]The pervasiveness of broadcasting was a criterion for its regulation in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[34]Nadel, A Unified Theory of the First Amendment: Divorcing the Medium from the Message, 11 FORDHAM URBAN LAW JOURNAL 163, 217 n.218 (1982).

[35]This is because a monopolist does not gain by having viewers diverted to another program it carries. Noam, at 214-15.

[36]Nadel, at 221-222.

[37]United States v. AT&T, 552 F. Supp. 131, 225 (D.D.C. 1982). Prevents the divested BOC's from providing information services.

[38]In re Application of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C. 2d 307, reconsidered in part, 22 F.C.C. 2d 746 (1970).

[39]Cable Act, Sec. 613. This restates the cross ownership rule.

[40]Cable Wrestles with Possible Pactel Entry into Business," BROADCASTING, July 4, 1988, at 32-34.

[41]Cable Holds, at 31.

[42]TCI's, at 60.

[43]Hart, Jr., The Evolution of Telco-Constructed Broadband Services for CATV Operators, 34 CATHOLIC UNIVERSITY LAW REVIEW 671 (1985).

[44]The Supreme Court has recognized that the "right of the viewers and listeners . . . is paramount." Red Lion, at 390.

[45]In re Cox Cable Communications, Inc., Commline, Inc., and Cox DTS, Inc., FCC 85-455 (1985).

[46]Cable Act, Sec. 552(5).

[47]Noam, at 216-17.

[48]Some transmission services are identified as "specialized carriers" and "connecting carriers" but the distinction is not necessary here.

[49]Wolfe, Chafing at Deregulation, States Attempt New Ways to Rein in Cable, CABLEVISION, March 28, 1988, 33, 36.

[50]CABLE TELEVISION REPORT AND ORDER, 36 F.C.C. 2d 143, 197 (1972).

[51]See Nadel, at 218 n.218.

[52]Cable: The First Forty, at 44.

[53]Krupetz, Cable's "Non-Cable Communications Services:" Cable Television as a Common Carrier, 8 COMM/ENT LAW JOURNAL 75, 90 (Fall 1985).

[54]Geller, at 621.

[55]National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F 2d 601 (D.C.Cir. 1976).

[56]Parsons, Toward a Theory of Cable Rights, Paper presented to the Law Division, Association for Education in Journalism and Mass Communication, Annual Convention, Aug. 1986.

[57]Kupetz, at 86.

[58]Again, to "achieve the widest possible dissemination of information." AP v. U.S.

[59]Veljanovski, Regulatory Options for Cable TV in the U.K., 8 TELECOMMUNICATIONS POLICY 290, 300-01 (Dec. 1984).

[60]Id.

[61]Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241

(1974).

[62]Parsons, at 40.

[63]Id., at 35.

[64]447 U.S. 530, 547 n.1 (1980).

[65]Parsons, at 38. The New York Supreme Court, for example, twice rules that cable is adequately vested with the public interest to support a finding of public utility status.

[66]Wolfe, at 36.

[67]Cable Act, Sec. 533(e)1.

[68]Brenner, at 4-18.

[69]93 Wash. 2d 567 (1980).

[70]Noam, at 225.

[71]See, e.g., Barnstone v. University of Houston, 660 F. 2d 137 (5th Cir. 1981), rev'g. 514 F. Supp. 670 (S.D. Tex 1980), whereby a State university-owned public TV station did not violate the First Amendment by refusing to air a particular film.

[72]455 U.S. 40 (1982). The Court held that Boulder's moratorium prohibiting a cable company from expanding its services did not escape antitrust scrutiny under State action doctrine.

[73]106 S. Ct. 2034, at 2038.